JURISDICTIONAL ISSUES BEFORE THE INTERNATIONAL CRIMINAL COURT: ROLE OF SECURITY COUNCIL IN THE COURTS JUDICIAL PROCESS.

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Research Problem:

The idea behind the creation of International Criminal Court (ICC) was that the investigation and prosecution of international crimes would be conducted on a permanent basis, out of the context of power politics by an independent transnational judicial entity that operates according to the principle of separation of powers, which is the basic requirement of the rule of law. Although Article 2(1) of the Relationship Agreement between the United Nations (UN) and the ICC, recognizes the court as an independent permanent judicial institution the powers of referral and deferral of prosecutions granted to the UN Security Council (UNSC) under Article 13(b) and 16 of ICC Statute make it vulnerable to political interference and can significantly affect the credibility and legitimacy of the court. The privilege granted to the UNSC to refer or defer an investigation or prosecution effectively subjects the court's exercise of jurisdiction to the vagaries of international power politics due to the voting procedure laid out in Article 27 of the UN Charter. This great power privilege unavoidably imposes upon the Court a practice of selective justice and the application of double standards. Magnifying those concerns, of the five permanent members of the Security Council, only France and the United Kingdom became Parties to the Rome Statute. Russia and the United States signed the treaty without ratifying it, and China has never signed the treaty. The fact that three of the P-5 members are not themselves parties to the court, yet exercise such power to refer other non-parties for possible prosecution, and to defer any investigations or prosecutions, is itself of great consequence to the credibility of the court. Furthermore Article 16 of ICC Statute provides an unprecedented opportunity for the UNSC to influence the work of a judicial body. While Article 16 of ICC Statute technically empowers the UNSC to defer investigations and prosecutions initiated by states or the Prosecutor as well as those by the UNSC, it would seriously damage the independence of the court if the UNSC could turn ICC proceedings on and off, particularly if the UNSC's decisions are politically programmed. With the court already suffering a very substantial backlash from African states, which are dismayed that all ICC prosecutions to date have been of African

[*] **WBNUJS/Acad2011-12/PhD/24/2011**

nationals (even if apart from Darfur and Kenya, as a result of referrals by African states themselves), it is extremely unacceptable for non-state parties on the UNSC to exclude themselves from ICC jurisdiction while referring another non-state party to the court.

Article 13 (b) of ICC Statute provides that the court may exercise jurisdiction over statutory crimes if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the UN Charter. This means that the UNSC can effectively create jurisdiction where it otherwise would not exist on the basis of the ICC Statute. The problem of whether the ICC can lawfully exercise jurisdiction over nationals of third States without those States consent is at the heart of much of the opposition to it by States that have so far not joined the ICC. It is argued that the ICC Statute is illegal because it violates accepted treaty law and departs from the *pacta tertiis* rule embodied in Article 34 of the Vienna Convention on Law of Treaties (VCLT) according to which a treaty does not create obligations or rights for a third State without its consent. The exercise of ICC jurisdiction over officials of non parties acting pursuant to officially approved policies of such state, would essentially involve adjudication of inter-state dispute about the legality of acts of non party states without the consent of such states. This will be most evident in cases in which senior state officials are indicted by the ICC. In addition, the act of state doctrine provides immunity to state officials for acts committed on behalf of the State. A first concern therefore is the legal basis of ICC jurisdiction over non party nationals without the consent of those states in situations referred by UNSC.

The UNSC's first use of its powers under the ICC Statute damaged both the credibility of the UNSC in the use of those powers, and the legitimacy of the court. While the outgoing Clinton Administration signed the Rome Statute without seeking ratification, the Bush Administration was actively hostile to the Court, announcing that the US intended never to ratify the Rome Statute and was thus free to act inconsistently with its purposes. In July 2002, over the opposition of all other fourteen members of the Security Council, the US threatened to veto a routine extension of the UN peacekeeping mission in Bosnia unless UN peacekeepers were granted permanent blanket immunity from ICC jurisdiction. In the compromise Resolution 1422 that was adopted, purportedly under the UNSC's power of deferral under Article 16 of ICC

Statute, granted immunity to all UN peacekeepers from non-state parties for a renewable one-year period. The resolution was further renewed for a second year in Resolution 1487 (2003). These resolutions were legally dubious as there was no investigation or prosecution underway to be deferred under Article 16 of ICC Statute. For a Council that would use its powers to refer non-state parties to the ICC, it was unseemly and delegitimizing to the Court that the Council's first use of its powers regarding the Court was to insulate one of its permanent members (as well as other non-state party contributors to peacekeeping missions) from jurisdiction. In the two Resolutions 1593 and 1970 whereby the UNSC referred situations to the ICC (Sudan & Libya), by linking the referral of a situation to a collective deferral in favour of certain categories of persons, the UNSC has not only undermined the authority of the ICC but introduced a policy of double standards into the practice of international criminal justice. The politicization of international criminal justice by the supreme executive organ of the UN, the SC, may lead to a systemic failure of the ICC before it has even been able to prove its worth and credibility vis-à-vis the international community.

Research Questions:

The research questions that arise for consideration are:

1. Whether the exercise of ICC jurisdiction over nationals of non parties, without the consent of that non party, in situations referred to the ICC by the UNSC would be contrary to international law?
2. Whether the ICC is entitled to review the legality of UNSC resolutions?

Scope of Research:

There are many issues bordering on the subject matter of this study and that can be treated only in passing and not all. The argument that the ICC Statute violates accepted treaty law to the extent that it creates obligations for States that are not parties to the ICC Statute has been made by US in regard to the court's principle of territorial jurisdiction under Article 12(2)(a) of the ICC Statute, which implies that nationals of non state parties are subject to the court's jurisdiction if the alleged crimes were committed on the territory of a state party to the ICC Statute – an argument that applies to UNSC referrals with greater force since Art. 13(b) in connection with the provisions (or, rather, omission) of Art. 12(2) gives authority to the UNSC to

refer a situation to the ICC in cases where the Court has no jurisdiction per se i.e. neither on the basis of nationality nor on the basis of territoriality. Furthermore, since the focus of this study is on the referral and deferral powers of UNSC under the ICC Statute, therefore, the legal basis of ICC jurisdiction over nationals of non party states only in situations referred by the UNSC to the ICC will be considered. It is clarified that this study will also not engage in the debate on the crime of aggression. ICC's concern with the principle of complementarity and admissibility in situations referred by UNSC under Art 13(b) is also outside the purview of this study.

Literature Review:

Article 21 of the ICC Statute provides that apart from the Statute itself, in interpreting the law, the court shall have recourse to other applicable treaties and the principles and rules of international law. According to Article 30 of the VCLT and in view of the quasi universality of UN membership, the UN Charter is the only legal instrument binding both non State parties and State parties to UNSC referrals to ICC under Chapter VII. Furthermore, the problem of *forum convenient* chosen to enforce the UNSC decision to initiate criminal proceedings before ICC is resolved by having recourse to the provisions of UN Charter, particularly, Article 24 and 25. The primary legal basis of the jurisdiction of ICC in situations referred to it by the UNSC is the UN Charter. (**Jose Doria**, **Conflicting Interpretations of the ICC Statute- Are the Rules of Interpretation of the Vienna Convention Still Relevant?**)

The UN Charter does not contain any specific provision on an independent judicial review of a decision of the UNSC. The ICC Statute is also silent with respect to the scope of judicial review of UNSC decisions. Article 2(2) of the Relationship Agreement between the UN and ICC declares that UN and ICC respect each others status and mandate. However, the ICJ Statute also does not contain any specific provision on possible judicial control over UNSC Resolutions. Article 25 of the UN Charter states that member states agree to accept and carry out the decisions of UNSC that are "in accordance with the present charter". Therefore it has been asserted that ICJ has power to decide whether or not an UNSC decision is in accordance with the present charter and whether or not it is *intra vires*. (**Ken Roberts, Second Guessing the Security Council: International Court of Justice and its Power of Judicial Review.)** Although in the Lockerbie case the ICJ rejected the request for provisional measures by Libya on the ground that Art 103 of the UN Charter rendered UNSC resolution a higher obligation than

any under the Montreal convention, the implication of the Lockerbie case demonstrated the need for some sort of judicial review of UNSC decisions. The ICTY in Tadic Case considered it was entitled to review the legality of UNSC Resolutions. Thus the cases brought before ICJ and ICTY have implied that there is room however limited for judicial review of the acts of the UNSC. (**K Hossain, Legality of the Security Council Action: Does the International Court of justice move to take up the challenge of Judicial Review?**)

Hypothesis:

It is hypothesized that the exercise of ICC jurisdiction over non state party nationals in cases of UNSC referrals is not contrary to international law. ICC should not be entitled to exercise powers of judicial review over UNSC decisions.

Research Methodology:

The methodological adopted in the present work would be doctrinal. The researcher will be using both primary and secondary sources for the purpose of study. The primary sources referred to would include statutes, case laws and international instruments; and secondary sources would include primarily textbooks and articles by eminent authors in addition to the World Wide Web. Underpinning this work would be a selection of noted and significant case law. The researcher will make an attempt to keep objectivity firm in the presentation while striking balance between narration and analysis.

Tentative Chapterisation:

The thesis would be tentatively divided into the following chapters:

1. **Introduction:** This will be a background chapter. It will give an overview of the problem, lay the issues and build a theoretical platform for the next chapters.

2. **Referrals and Deferrals under the ICC Statute:** This chapter will analyze the UNSC referral and deferral provisions under the ICC Statute in light of the drafting history of the provisions.

3. **Legal Basis of ICC Jurisdiction over Non Party Nationals:** This chapter will examine the competence of the ICC to exercise jurisdiction over nationals of states that are not parties to the ICC Statute without the consent of those states.

4. **Third States Obligation to Co-operate and Immunities:** This chapter will study the UNSC referrals in the specific context of Darfur and Libya and examine the extent to which third states have obligation to cooperate with ICC.

5. **Judicial Review of UNSC Resolutions:** The UNSC, wielding its Chapter VII powers, has both referred situations to ICC and requested that it defers matters, purportedly on the basis of Article 16 of ICC Statute. This chapter will analyse the legality or otherwise of the various resolutions passed by the UNSC in a chronological manner. Thereafter it will turn to address the question of judicial review of UNSC referrals and/or deferrals. In the absence of guiding principles with reference to ICC's power of judicial review, the study will turn to the practice of ICJ and ICTY which may be particularly instructive in this regard.

6. **Conclusion:** This will be the last chapter and will contain an analysis of the discussions in the foregoing chapters in light of the questions the researcher has posed to herself.

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